SPECIAL FOCUS:
Design and editorial

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Folio:

NOVEMBER 1985 THE MAGAZINE FOR MAGAZINE MANAGEMENT $6.00

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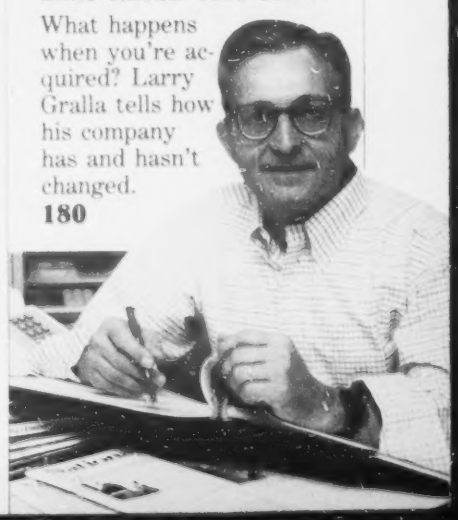

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UPDATE

Magazines poised to cash in on new retail profit analysis system

To benefit, magazines must convince retailers to see direct product profit their way

New York City—The increasing use of direct product profit (DPP) systems by major retail chains to analyze the profitability of items could be a big break for magazines in terms of gaining display space.

Up to now, most chains have relied on gross margin (GM) as a means of evaluating products and allocating space. Under this standard, magazines have had to fight for additional space. Their gross margin, when both checkouts and mainline displays are included, is about 28 percent (20 percent off cover price, plus the 6–8 percent that retailers collect of the 10 percent retail display allowance, or RDA). While that margin is quite good in comparison to many categories—particularly when magazines' high turnover is taken into account—categories such as candy and gum (approximately 32 percent GM) greeting cards (50 percent GM) and stationery (approximately 40 percent GM) have been giving magazines a run for their money.

Accounting for direct costs

DPP systems, which have become feasible because of the increasing sophistication of cost modeling, computerization and the advent of Universal Product Code (UPC) scanning, take into account a product's costs, as well

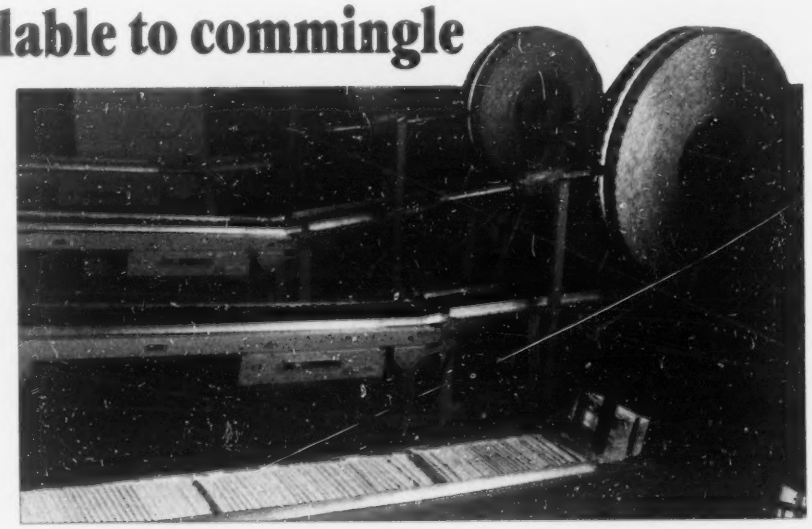
CONTINUED ON PAGE 31

Technology available to commingle magazines

Publishers will save postage by commingling magazines in bundles, experts predict

Winnetka, Ill.—While the U.S. Postal Service offers substantial discounts on presorted mailings, the problem for small circulation magazines has been that they don't normally have the volume to make fine presortation feasible. Now, however, experts say that bindery and mailing shops will soon overcome the snag by using computer driven equipment to commingle different titles within mailing bundles.

"This could mean an awful lot of bucks for publishers," notes Lawrence C. Flynn, director of customer services at Hearst Magazines. Flynn says an analysis of *House Beautiful*'s and *Colonial Homes*' mailing lists revealed that, with six-copy bundles, comming-



***Handling system** developed by McCain Manufacturing for* **Newsweek** *holds bound, demographic editions until they can be addressed and commingled.*

CONTINUED FROM PAGE 27

Some retail direct costs just don't apply to magazines

as GM. DPP is calculated by adding up gross margin plus discounts and allowances, then subtracting the item's direct handling costs. These costs will be precisely calculated, using computer models; retailers will know how many seconds it takes to unpack, price and stock a particular item on the shelf; and exactly how much money that time costs them.

With direct handling cost accountability included in the profitability equation, magazines are bound to look good in comparison with many other products, according to Jack Fitzmaurice, director of the Periodicals Institute (PI). Direct costs such as warehouse direct labor, warehouse inventory expense, warehouse operating expense and transportation to the store account for an 8–12 percent deduction from the gross profit of many items, he says.

"We won't have that deduction" on magazines, Fitzmaurice notes. "Those kinds of costs just don't apply with magazines. Retailers don't even have to price our products." PI has recently completed a study on front-end of the store profitability which indicates that magazines account for 50 percent of sales and only 14 percent of inventory dollars, he reports. With retailers able to home in on net profit with DPP systems, "there's no way that magazines could be in jeopardy" as a category, he asserts.

"Magazines have a high gross margin, and it's fair to say that, under DPP systems, they will look even more attractive," agrees Jim Hammonds, vice president of the Food Marketing Institute (FMI).

DPP model released

Exactly how much magazines will benefit from DPP systems, however, depends to some extent on what types of allowances and costs are structured into the systems, and, of course, what numbers.

In a recent *Progressive Grocer* article, food industry consultant John R. Phipps of Touche Ross & Co. pointed out that DPP raises questions such as exactly *which* discounts, allowances and rebates, as well as which costs, should be included in the DPP formula.

Publications versus other general merchandise in supermarkets

	1984 sales volume ($ millions)	Average retail gross profit %
Automotive	$289.88	24.5%
Baby needs	233.31	35.8
Batteries	401.25	35.6
Disposable lighters	95.95	37.5
Greeting cards	509.49	47.8
Housewares	2,493.84	39.8
Light bulbs	392.44	38.9
Pet supplies	372.14	38.3*
Photo needs	657.15	21.6
Publications	1,296.41	27.4**
Soft goods	1,003.75	41.8
Stationery	657.26	37.5
Toys	162.28	38.2
All other	304.49	30.8
Category total	$8,859.64	35.9%

*Outside vendors
**Outside vendors, including display, placement allowances
Source: *Progressive Grocer*, July 1985

***Publications' gross margin** is lower than the margins of many other types of general merchandise, but their sales are second only to housewares. Once direct product profit systems are in wide use by retailers, publications should stack up even more favorably against other general merchandise and other categories.*

FMI has just completed a DPP computer model for dry groceries—the first industry-wide model of its kind, according to Hammonds. "It's basically a computer spread sheet that lays out what is and is not to be included in calculating DPP for dry groceries," he explains. And, he says, this model may be the one which will be used for magazines—at least those on mainline displays.

The model will indeed take magazine RDAs into account, Hammonds reports. He also stresses that the model does not supply actual numbers for gross margin, allowances or costs; retailers will "plug in" their own numbers. "Magazines, for instance," he says, "might come out looking even better in a retail market that is high labor, high cost," he notes.

The single-copy sales task force of the Magazine Publishers Association has been investigating DPP. It is reportedly planning to hire a consulting firm to come up with the solid data magazines will need to tell their story to the retail community. Manufacturers of other products have been doing the same. "A lot of companies go into retail stores and do a DPP analysis on their item for the retailers," says Hammonds, "then supply them with the figures."

Another concern for magazines in terms of DPP is that, as a system designed to analyze item-by-item profitability, it could, if DPP numbers are interpreted in a void, be used to weed out less profitable magazines. "When we go to retailers about DPP, we *must* be unified as an industry," contends Fitzmaurice. "We must continue to do a category sale, and maintain that all displays should include every category of magazine and book, although the numbers of titles within each category will vary. If we don't do this, a lot of publishers could get hurt, because low turnover magazines will be identified. Retailers have to understand that a total magazine display is the key to sales."

One good sign: FMI has indicated that DPP is a valuable tool, but should be only one factor in marketing and space allocation decisions. Favorable DPP results for a product should be used in marketing, and unfavorable ones should be used to find ways to improve product performance, according to Phipps.

Now that the single-copy slump has geared up and unified the magazine industry somewhat, sources say that cooperative large scale marketing efforts among industry groups, including MPA, PI and wholesaler and national distributor groups, are a stronger possibility than ever before. □

***Publishing entrepreneur** David Caruba, 21 and still in college, has parlayed a newsletter into a magazine for "secret agent" fans.*

magazine, which has a circulation thus far of 5,000 (3,000 subscribers; 2,000 newsstand).

The magazine is distributed all over the United States, Canada and, especially, in England where there are a large number of people who are great fans of "The Avengers" and "The Man from U.N.C.L.E.," among other secret agent television programs.

Advertisers include book companies, T-shirt companies and conventions, says Caruba. The inside of the magazine is black-and-white and current rates are $200 for a full-page ad; $135 for a half and $85 for a quarter. The 64-page premiere issue carried only five pages of advertising—most of it fractional.

Caruba was a high school student and an avid fan of "The Avengers" when he first decided to start a newsletter on the topic. An ad in a newspaper for TV viewers brought in about 50 to 60 orders in the first week; and, to his great surprise, over 200 orders in the second week.

The overwhelming response encouraged him to turn the photocopied newsletter into a printed tabloid. He was a freshman in college when, as he puts it, "things really took off.

"It's a lot of fun and a nice way to earn money—doing what I like," says Caruba. He observes that the average student goes to class, reads the text, but never does anything about it. "There's only one real way to learn how to publish a magazine and that is to do it!"□

1980-84: Men's magazines hardest hit at newsstands

Over five years, single-copy sales dipped for 10 of 14 ABC-audited categories

Schaumburg, Ill.—A FOLIO: analysis of the Audit Bureau of Circulations (ABC) *1985 Magazine Trend Report* shows that men's magazines was the category hardest hit by single-copy sales declines during the five-year period 1980 to 1984.

Counting only classifications in which ABC had at least three member magazines during that period, categories showing the biggest drops in single-copy sales were men's (–26.8 percent), mechanics and science (–25.9 percent) and newsweeklies (–23.0 percent).

Business and finance magazines, meanwhile, saw their newsstand sales increase 66.3 percent; and women's fashions, beauty and grooming magazines experienced a 24.1 percent rise in single-copy sales.

In all, among the 14 classes analyzed by FOLIO:, 10 suffered losses in newsstand sales while three enjoyed

Circulation trends for ABC-audited magazines

(Percentage increases/decreases between 1980 and 1984)

Classification*	Number of magazines	Average paid circ.	Subscriptions	Newsstand sales	Subscription orders taken during year
Automotive	5	7.1%	11.3%	–0.4%	17.1%
Business and finance	7	11.0	9.4	66.3	61.2
Epicurean	4	15.7	23.2	–17.4	51.6
Fishing and hunting	6	54.6	64.3	–8.8	106.1
General editorial	17	3.8	5.8	–7.4	11.8
Home service and home	17	15.3	20.5	–16.2	31.4
Mechanics and science	3	–4.0	0.7	–25.9	34.0
Men's	5	–17.2	5.4	–26.8	21.8
Newsweeklies	9	0.5	18.0	–23.0	34.2
Science	5	53.9	91.6	–12.7	33.0
Sports	7	4.5	0.3	28.8	14.8
Travel	4	10.6	10.3	n.a.**	46.0
Women's	20	–0.3	7.3	–7.7	41.1
Women's fashions, beauty and grooming	4	15.9	2.8	24.1	–9.5

*Classifications with fewer than three magazines were omitted from table
** Magazines in the "travel" classification had either no, or very few, newsstand sales
Source: Audit Bureau of Circulations *1985 Magazine Trend Report*

***The big picture** of circulation for consumer magazines during the five years '80-'84 is no surprise. Single-copy sales declined for 10 to 14 categories analyzed; subscriptions rose in all categories.*

gains. (In the travel classification, member magazines had few or no newsstand sales during the period covered.)

The figures on subscription sales paint a much brighter picture. For all 14 categories, subscription sales were up. Over the five-year period, science magazines' subscription circulation rose by 91.6 percent; and the fishing and hunting class increased its subscriber base by 64.3 percent.□

Publishers' direct mail noted by execs

Execs say they get most unsolicited mail from publishers, survey indicates

New York City—Business executives say they receive the most promotion mail from publishers and sponsors of seminars and conferences, according to a survey conducted by Stephan Direct, Inc., a direct marketing agency specializing in business-to-business direct response communication. Executives ranked research/reference materials as third in terms of volume received.

The survey questionnaire was mailed out to 500 business executives representing more than 10 industries, including health care, banking, insurance, advertising and publishing itself. Response was just over 20 percent (108 executives).

Seventy-five percent of respondents reported allocating 5 percent or less of their time to responding to unsolicited business mail. Nearly half (48 percent) replied that they always open unsolicited business mail, while 44 percent reported they do so only sometimes and 8 percent said that they never do.

The average business executive gets 44 pieces of business-related mail in a single week, according to the survey. Upper level executives get more; in fact, the volume of mail received by business executives increases in direct proportion to the importance of the job title within the company. Presidents, general managers and division heads normally receive in excess of 75 pieces of business mail per week.

Among suggested improvements in

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Living with the risk of libel

The threat of libel claims is not going to go away. But sound journalistic practices and appropriate insurance will significantly lessen the danger of loss

BY JOHN C. LANKENAU

The widely publicized costs of defending the recent libel suits brought by General Westmoreland, Mobil president Tavoulareas and General Sharon have greatly heightened the media's concern about defamation suits. Reportedly, the cost of defending the Sharon case exceeded $5,000,000; the Westmoreland defense cost about $6,000,000; and, as of this writing, the Tavoulareas defense cost in the range of $1,500,000.

Defense costs have rapidly increased to the point where they now constitute over 80 percent of the total amounts paid out by media insurers.

The average size of libel verdicts has also been steadily increasing. In 1982, nine jury awards exceeded $1,000,000; by 1984, the number had grown to 11. The average *initial* damage award in 1982 was about $2,500,000; in 1984, the average was nearly $3,000,000. These initial awards are three times the average damage award in product liability and malpractice actions. (Most, if not virtually all, of these initial awards have been or will be reversed or very substantially reduced on appeal.)

On the positive side, many libel cases are dismissed before trial, and on-trial defendants are winning more but still less than half the cases. (See chart.)

These developments raise questions about what steps publishers should take to minimize their exposure.

There are several measures that can be taken:

- In-house procedures that will reduce the risks of media suits should be adopted.
- Warranties against claims for libel, copyright infringement and the like should be obtained from all freelancers and advertisers.
- Potentially actionable material should be reviewed by counsel.
- Insurance against media risks should be purchased.
- Controls over the cost of defending media suits should be established.

Let's consider each of these steps in turn.

Most claims for libel, invasion of

John C. Lankenau, a partner in Lankenau, Kovner & Bickford, a New York City law firm, has extensive experience in media defense work generally as well as in commercial, securities, tax and copyright litigation. He is Chairman of the biannual Practising Law Institute program for publishers and broadcasters on media insurance and risk management, and is also a member of the Lawyers Committee of the American Association of Publishers.

Illustrations by E. Salem Krieger

privacy, copyright infringement and other media-related claims arise from a publication's editorial content, rather than from its advertising. The starting point in preventing claims based on the editorial content involves following several rather simple guidelines.

First, take care when selecting staff writers and editors—as well as freelancers—by checking references for accuracy and fairness.

Second, senior management should regularly stress its concern with truthfulness and fairness.

Third, editors and writers should be cautioned against saying, and certainly against writing, anything that suggests the magazine's only interest is in getting a story. In the Tavoulareas case, the Court of Appeals found evidence of reckless disregard for the truth in Bob Woodward's statement at a staff meeting of *Washington Post* reporters that he wanted "holy ---- stories"—when readers opened up their *Post* in the morning they'd say "holy ----!"

The Court of Appeals in Tavoulareas also found evidence of reckless disregard for the truth in the statement by a reporter that it's "not every day that you knock off one of the seven sisters," referring to the seven largest oil companies.

Whether statements of that type will finally be held by the entire Court of Appeals to be evidence of reckless disregard for the truth remains to be decided (as of this writing, the appeal is pending), but, plainly, such statements are bound to color the jury's or judge's view of the defendant.

Obtaining necessary rights

Fourth, written agreements prepared by counsel should be signed by all freelance writers and photographers. These agreements should guarantee that the necessary rights are being conveyed to the publication and that the material is free of libel, privacy or copyright problems. Absent such an agreement, the publisher will obtain only one-time publication rights. Procedures should be established to make sure that the form agreements are regularly used and are retained.

Fifth, to safeguard against claims for the loss or destruction of manuscripts, art or photographs, appropriate insurance should be obtained. A system of logging in all deliveries of special or original art work (including photographs) should be established and a form receipt should be delivered to and countersigned by the writer, artist or photographer limiting liability for loss or destruction.

Sixth, articles that might give rise to claims should be reviewed by a fact checker and by counsel.

Seventh, reporters should keep their notes for at least a year, as those notes can prove extremely helpful in defending libel suits.

Eighth, if a claim letter is received, counsel should be consulted immediately. Counsel will often want to talk to the writer, check the writer's notes and take other steps to settle the claim before it goes further. Prompt notice must also be given to the insurer.

Finally, many publications have their counsel conduct annual training sessions to keep the editorial staff informed of the standards applicable to claims and to alert them to potential problems.

Many media counsel take the view that specific guidelines should not be put in writing, however, because, in some circumstances, they can be used in litigation as evidence of carelessness if the guidelines were not followed.

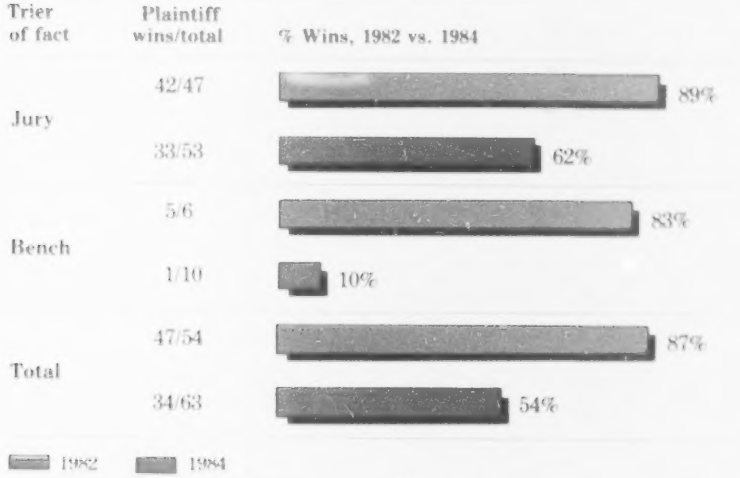
Following these simple procedures will result in fewer claims—and those that do arise will be easier to defend. Following these procedures will mean that insurance costs can be reduced and that insurance will remain available. (An insured's loss experience determines the premiums that are charged and whether insurance can be secured. Media with heavy insured losses are finding insurance difficult and expensive to obtain.) Premiums may even be reduced by explaining in-house procedures—including fact-checking and prepublication review by counsel.

Warranties and indemnities

In addition to reducing the risk of claims through in-house procedures, exposure from media related claims can be reduced by contractual warranties (and possibly indemnities) from those who supply the material that is published.

As noted above, freelance writers, photographers and artists should warrant their materials against libel, invasion of privacy and copyright infringement. Warranties will encourage writers and photographers to prepare their materials with care. Photographers should also warrant that they have appropriate releases from subjects, especially in the case of advertisements. Publishers should insist that advertisers and advertising agencies extend indemnities against losses from claims arising from their advertisements. Normally, these indemnities are

Outcome of libel cases compared



Information compiled by Libel Defense Resource Center

***A positive aspect of libel cases** is that many are dismissed before trial, and on-trial defendants are winning more cases—although still less than half, as the chart shows. The figure to the left of slash represents the number of plaintiffs that won at trial in this category. Figure to the right of slash indicates total number of cases brought to trial in this category.*

included in the rate card and the Standard Rate and Data Service. The publisher's advertising invoice should also contain corresponding indemnities.

Insuring against lawsuit costs

Since the 1930s, insurance has been available to protect publications—both print and electronic—from the danger of loss from libel, copyright infringement and related torts. Currently, such policies are offered by, among others, CNA Insurance, Employers Reinsurance, Firemen's Fund, Mutual of Bermuda (available to members of the American Newspaper Publishers Association), and Seaboard Insurance.

The provisions of each policy differ in important ways. Careful review of the various policies by counsel is wise. Most insurers will negotiate some changes in their standard forms.

Premiums for virtually all types of liability insurance, including media insurance, have sharply increased in the past year, in part because of the staggering losses in product liability cases and the upward trend in awards to plaintiffs in all kinds of liability situations. Media insurers have recently experienced heavy losses because of the growing costs of defense. Despite its growing cost, media insurance is worth the expense.

'Claims made' v. 'Occurrence'

The two fundamental types of liability insurance are "occurrence" and "claims made." "Occurrence" type insurance provides coverage for events that cause losses during the policy period, whenever the losses are discovered or claims are asserted, so that all issues of a magazine published while the insurance is in effect are covered—regardless of when a claim is asserted. "Claims made" type insurance affords coverage for claims actually asserted during the policy period, regardless of when the publication took place.

"Occurrence" coverage is preferable as it insures all claims arising from activity during the policy period whenever asserted—even if *after* a policy lapses. If "claims made" coverage is not renewed, claims based on what's published during the policy period, but that are asserted afterwards, would be uninsured.

What risks are covered?

Generally speaking, the standard media policy insures against liability for claims of the following types: libel and defamation; invasion of privacy and copyright infringement.

Photographers should warrant their materials against libel, invasion of privacy and copyright infringement; they should also warrant that they have appropriate releases from subjects.

Some media policies also expressly insure against claims of trespass and wrongful entry in newsgathering, misappropriation of ideas, claims based on indemnities extended by the insured, unfair competition arising from media claims, trademark infringement, eavesdropping, false arrest, harm to feelings, emotional distress, product disparagement, trade libel and outrageous conduct. The form language of the CNA policy, for example, and the Employers Reinsurance Multimedia form are broader than some of the other policies in respect to coverage against these risks. While other policies may also cover these risks, the policy language, in some instances, may not be as explicit. Often an insurer will be willing, if requested, to amplify the form policy language.

Actions for copyright infringement and invasion of the right of publicity sometimes begin by an application for an injunction. Insurance against the costs of resisting such applications can be obtained from some insurers.

Other policies, such as those of Employers Reinsurance and CNA, provide insurance against claims arising from advertising the insured's publications. Thus, insurance would apply to claims based on an advertisement for the magazine that reproduced, say, a photograph from a past issue or an excerpt from an upcoming investigative piece.

Insuring the costs of defending claims is advisable because over 80 percent of the costs resulting from media claims is legal fees. (The remainder is paid out for settlements or judgments.)

What risks are not covered?

Many jurisdictions, including New York and California, do not permit punitive damages to be insured—and the risk of a punitive damage award poses a serious danger. Virtually every libel and invasion of privacy lawsuit will include a claim for substantial punitive damages, and in about half the libel verdicts obtained in 1982 and 1984, punitive damages were awarded—and some were substantial: Tavoulareas won a punitive damage jury verdict of $1,800,000; the average initial punitive damage award in the last few years has been over $2,500,000. (To date, however, the highest finally sustained award is $300,000.)

Given the seriousness of the exposure, it may seem strange that punitive damages are not insurable. The reason

lies in the basic purposes of punitive damages: to punish and deter the wrongdoer. If the wrongdoer can shift the loss to an insurance company, then, in the view of some states, those purposes are frustrated.

Most policies do not expressly insure punitive damages—and some even contain language that can be construed as *not* covering punitive damages. However, certain insurers, for instance, CNA, will, at no additional cost, expressly insure punitive damages by delivering the form policy and a so-called "damages" endorsement insuring punitive damages to an office of the insured located in a state permitting punitive damages to be insured. Obviously, this possibility should be explored in view of the importance of this coverage—as the *National Enquirer* learned when Carol Burnett was awarded punitive damages of $200,000, which the court had held were uninsured.

Who is insured?

To start with, the owner of the magazine, employees, officers, directors, stockholders and partners are insured. But what about freelance writers and photographers? Some insurance policies (Mutual of Bermuda is one such example) provide coverage for stringers and freelancers. On the other hand, several policies do not extend this coverage. Should that matter to a publisher? It often does.

Usually the writer or photographer is named as a defendant, but is often unable to afford the considerable costs of defense. Because a default judgment or an inadequate defense could cause the writer to feel abandoned, be uncooperative in the defense and, in extreme cases, decide to cooperate with the plaintiff, most publishers decide to provide a defense of the writer whether or not the writer is covered. Insurers will sometimes bear these additional costs, but not always. Hence, coverage of freelancers is desirable.

Selecting deductibles and limits

The deductible is the amount that an insured must pay in a suit (*e.g.*, for defense or in settlement) before insurance takes over and pays the costs of the suit. Attention should be given to whether the deductible applies separately to each claimant or whether the deductible applies to all claims arising from one issue of the magazine.

The limits are the maximum amount that the insurer will pay in defending the suit, in settlement or on a judgment. Some policies allow the insured to select two limits, one for each occurrence, *i.e.*, publication, and another for all claims under the policy.

The limit provided in an underlying policy can be increased by excess insurance. An insured could, for example, have a $5,000,000 limit on the underlying insurance and also buy $10,000,000 of excess insurance for a total limit of $15,000,000.

There is no formula or rule that can answer the questions of what deductible and what limit should be chosen. Following are some of the factors that should be weighed:

1. As to the deductible, what losses the publisher can sustain without undue financial strain.

2. As to the limits, the size of recent verdicts.

3. Whether insurance is viewed as providing catastrophe protection.

4. The kind of editorial material published.

5. The quality of editing, fact checking and prepublication review from the standpoint of preventing claims.

6. The insured's track record of claims in recent years—how many, how serious, the amount of defense costs and the cost of final disposition.

After this information has been assembled and considered, the final steps are to secure premium quotes for different deductibles and limits and then to consult with your counsel, your broker and the insurers that have supplied quotes.

Other important policy provisions

Many news stories are secured from confidential sources that the reporter has promised he will not disclose. Because policies often require the insured's cooperation in the defense, the question can arise whether a reporter's refusal to disclose the source in defending a suit violates that clause. Some policies expressly provide that coverage continues and is *not* affected by the refusal to disclose a confidential source; others are silent in that regard. Obviously, an assurance of coverage, notwithstanding a refusal to disclose a confidential source, is preferable.

If yours is one of the many publications that are distributed outside the United States, it is especially important to have worldwide insurance because laws vary widely from country to country. Some policies provide that protection, while others do not.

Before suit is brought, potential claimants will often demand a retraction or correction of allegedly defamatory material. Some policies require the insured to publish a correction or retraction when the story is "untrue" or when "justified" or "reasonable"; other policies leave the matter entirely to the insured's judgment, which is a better provision.

Because sensitive First Amendment interests are often raised by libel litigation, most media wish to select counsel to defend suits. Most policies grant that right to the insured.

The insured and the insurer sometimes disagree on whether or not a suit should be settled. Sometimes the insured wants to continue to litigate as a matter of principle, while the insurer views the suit in purely economic terms. The reverse is also sometimes true—the insured would like to settle to avoid the danger of a jury finding of falsity, or to halt the expenditure of time and attention by staff, whereas the insurer wishes to continue the litiga-

Beware of lawyers who represent both libel defendants and plaintiffs

Publishers who must hire a libel defense lawyer should make sure that the prospective attorney represents defense clients only, and not libel plaintiffs too, according to attorney Lankenau.

"Lawyers who represent both libel defendants and plaintiffs are serving two masters. The inconsistent positions that lawyers who serve both types of clients are forced to take on sensitive First Amendment issues will inevitably impair their credibility with the courts," Lankenau says.

"Because of the serious harm and 'bad law' the media has suffered from counsel working both sides of the street, some media insurers will not insure companies whose libel defense counsel also has libel plaintiffs as clients," he states.□

tion. The policy should provide a mechanism for resolving these differences. Typically, the party wishing to continue the litigation bears future expense and risk and the party wishing to settle pays the amount of the available settlement.

Other desirable insurance coverage

Besides the media policy, other insurance for media-related activities is usually advisable. A rider to fire and extended coverage insurance can usually be secured that will insure against destruction of or damage to original art, photographs or manuscripts.

Sometimes art or photographs turn up missing. To cover this risk, so-called "loss of valuable papers" insurance can be purchased, which insures against liability for the loss of manuscripts, art or photographs, as well as against the cost of defending these claims. The importance of this insurance is illustrated by one recent case where a verdict of over $300,000 was secured for the unexplained loss of some 200 photographic slides.

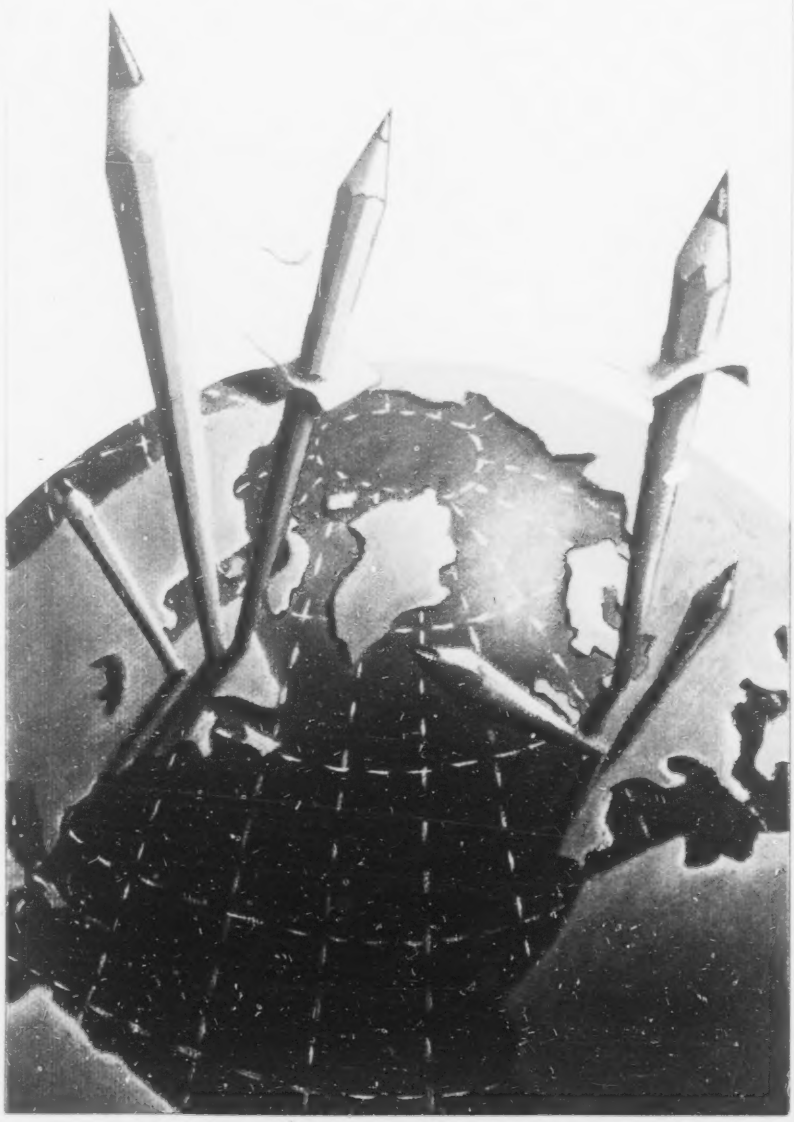
Personal injury suits have been brought based on editorial content. Examples are suits for errors in navigation charts leading to an air crash, mistakes in an experiment in a science text that produced an explosion, improper instructions in a cookbook, and "wrongful conception" based on a birth control booklet. Insurance against these risks is available from most media insurers.

Even after taking the steps outlined above, lawsuits will be brought and those suits must be defended. Because of the high legal costs of defending suits, several publications, including *The New York Times* and Gannett, have adopted measures designed to control and reduce these costs. Media insurers are also studying ways of reducing defense costs.

The fundamental approach of the *Times* and Gannett is to require defense counsel to provide a budget figure for each stage of the litigation—initial investigation, preliminary pleadings, factual investigation, preliminary motions, legal research, document discovery, depositions, summary judgment, trial preparation and conduct of the trial.

Speaking as one who regularly defends media lawsuits, developing such a budget is always difficult because there is no way of predicting what the defense of a suit will entail. Yet budg-

If yours is one of the many publications distributed outside the U.S., it's especially important to have worldwide insurance because laws vary widely from country to country.



ets that are subject to periodic updates and revision for unexpected developments can be extremely helpful for both counsel and the publication. The mere fact that a budget is required impresses on counsel the need for cost control.

To encourage observance of the budget, the *Times* will not pay bills that are over budget unless there has been prior approval for the increased expenditures.

In addition to the budget, Gannett, at the very outset of the suit, discusses overall strategy and the costs of implementing that strategy. That approach reinforces counsel's awareness of the client's concern with the costs of defense.

To avoid duplication of work, Gannett has established a computer-based index to its brief bank. Whenever an issue arises that has been previously briefed, the brief bank provides a brief on that issue, thereby significantly reducing the research required.

Another useful source of pleadings, briefs and other forms is the Libel Defense Resource Center (located at 404 Park Avenue South, New York, N.Y. 10016), a nonprofit, tax-exempt service organization to the media. The LDRC has assembled files of pleadings, briefs and forms on most of the issues commonly raised in libel and invasion of privacy suits.

Harper & Row has had success with another approach to reducing defense costs: the use of in-house counsel to appear in and defend most media suits brought against the company. In-house counsel often handles all aspects of the litigation—including pleadings, discovery, trial and appeal. Many other companies are also expanding the role of in-house counsel to reduce legal costs.

In conclusion, the danger of loss from media-related activities can be reduced and adequately insured. Any publisher who takes pains to maintain sound journalistic practices and purchases appropriate insurance should have little reason for concern.□

More detailed information on the subjects covered in this article may be found in the book titled *Media Insurance and Risk Management* published by the Practising Law Institute, 810 Seventh Avenue, New York, N.Y. 10019, John C. Lankenau, editor.

Checklist for libel insurance coverage

As an aid to reviewing the adequacy of your existing or proposed insurance, the following checklist can be used:

☐ Is the standard coverage discussed in the article provided?

☐ Is there coverage for product disparagement, trade libel, infliction of emotional distress, right of publicity, outrage and outrageous conduct, false light, trespass, misappropriation of ideas, wrongful entry, false arrest or malicious prosecution, infringement of trademark, trade name, trade dress, service mark, or service name and unfair competition?

☐ Is coverage afforded for advertising, publicity, promotional materials and promotional appearances of any kind?

☐ Is there coverage for punitive or exemplary damages up to the policy limit?

☐ Is there coverage for the entire editorial process from acquisition, researching and preparation to the final product including serialization, distribution and licensing?

☐ Does coverage continue if the insured refuses to reveal a confidential news source, and does the policy contain language to that effect?

☐ Is there reimbursement of legal fees and claim expense?

☐ Does the insured select defense counsel?

☐ Does the policy prohibit the insurer from forcing the insured into a settlement it may not approve?

☐ Does the insured and its lawyer decide when a retraction or correction is warranted?

☐ Is there coverage of costs of defending motions for injunctive relief related to the named perils, including actions involving works under contract prior to actual distribution?

☐ Is contractual liability for insured perils provided, thereby giving the insured the ability to extend coverage to distributors, advertisers, sponsors, advertising agencies, printers, correspondents, freelance writers, artists, independent contractors and other parties they agree to protect?

☐ Does the coverage exclude malicious or intentional acts (which can bar coverage of punitive damages)?

☐ Is coverage extended on an "occurrence" basis (covering material disseminated during the policy period, regardless of when the claim is made) rather than on a "claims made" basis (which applies only to claims made during the policy period)?

☐ Does the deductible apply to each occurrence (*i.e.*, one deductible for multiple claimants as a result of any one book, periodical publication, broadcast or film) rather than to each claim (a deductible for each claimant)?

☐ Does the policy apply on a worldwide basis (not limited to claims made in the United States)?

☐ Is coverage provided not only for the publisher, but also for employees, officers, directors, partners, trustees, stockholders, and independent contractors?

☐ Is the coverage on a "pay on behalf" basis rather than on an indemnification basis?

☐ Is there insurance against the unexplained loss of photographs, art and manuscripts?

☐ Is coverage afforded for liability for property damage or bodily injury arising from editorial content, *e.g.*, recipes, maps, directions, etc?

☐ Does the fire and extended casualty policy insure against damage to or destruction, either on or off the premises, of art, photographs and manuscripts from those occurrences?

☐ Is comprehensive umbrella insurance advisable?

This list is based in part on a "buyer's checklist" distributed by Media/Professional Insurance, Inc., 1001 East 101st Terrace, Kansas City, Missouri 64131.